IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No. 672 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE P.B.MAJMUDAR

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ILABEN RAVJIBHAI PATEL
Versus
AMITKUMAR RATILAL PATEL

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Appearance :
None for the Appellant
Respondent is Served

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CORAM : HONOURABLE MR.JUSTICE P.B.MAJMUDAR

Date : 03/10/2006

ORAL JUDGMENT

The appellant is the original defendant against whom the respondent had instituted the proceedings under the Hindu Marriage Act being Hindu Marriage Petition No.22 of 1998. The respondent had preferred the said petition under Section 13 of the Hindu Marriage Act. The case of the original respondent – present appellant before the trial Court was that the respondent – present appellant is his legally wedded wife and the marriage was solemnised between them on 10.5.1996 at Anand. The wife after staying with the husband for some time went back to Canada from where she had come for the marriage. According to the petitioner-husband even though he had applied for getting Visa, he could not get the same. The respondent-wife had also shown unwillingness to come to Anand and stay with her husband. On this and other averments the aforesaid petition was filed by the respondent before the trial Court.

So far as the appellant – original opponent of the said Hindu Marriage Petition is concerned, she had sent her written statement from Canada, but thereafter did not remain present during the proceedings. After considering the evidence produced by the plaintiff, the trial Court had come to the conclusion that the respondent had deserted him for the last two years as on the date of filing of the Hindu Marriage Petition. The trial Court found that it is next to impossible for the parties to stay together as husband and wife. The trial Court accordingly decreed the suit on 14.12.1998. The present appellant thereafter preferred an application under Order 9 Rule 13 of the Civil Procedure Code on the ground that she never knew about the decree and because of the short date given, she could could not attend the Court on 6th May 1998 as in

order to attend to the Court, she was required to obtain the Visa, etc. In her application she had averred that she approached her Barrister at Canada and thereafter she sent the reply requesting the Court to inform her about the next date. Thereafter, when she came to know that the respondent was going to marry again, she rushed back to India and on making enquiry she came to know that an ex parte decree was passed. The trial Court after hearing both the parties by its judgment and order rejected the said application against which the appellant – wife filed this appeal from order under Order 43 Rule 1 of the Civil Procedure Code.

I have gone through the papers as well as the impugned order. It is required to be noted that before preferring the application under Order 9 Rule 13 the applicant had preferred an application for condonation of delay, which was granted by the trial Court. In her application under Order 9 Rule 13 of the Civil Procedure Code the appellant had stated that after the first date of hearing, which was mentioned in the summons was 6th May 1998 and the summons was received by her on 5th May 1998. It is further stated in the application that since the date was so short, it was not possible for her to attend the Court on the very next day i.e. on 6th May 1998.

The learned trial Judge while rejecting the said application has found that even though the first date of hearing was fixed on 6th May 1998, the Court has not passed the order on the said date but the decree was passed on 14.12.1998. The learned trial Judge has accordingly found that the decree was not passed in haste. The learned Judge has further observed that the appellant could have come to Anand and fought out the litigation. The learned trial Judge found that the summons was duly served upon the respondent on 5th May 1998 and the petition was taken up for hearing and ultimately the decree was passed

on 14.12.1998.

In my view, the learned trial Judge has completely misdirected himself while rejecting the application submitted by the present appellant. It is true that in the summons which was served upon the defendant (the appellant herein) the date was mentioned as 6th May 1998 for filing appearance and that on that very day the suit was not disposed, but it is required to be noted that the appellant herein received the said summons in Canada on 5th May 1998 wherein the first date of appearing was shown as 6th May 1998 and the appellant was required to appear before the trial Court on that date. In her application for setting aside the ex parte she has clearly mentioned that it was impossible for her to appear before the Court at Anand on 6th May 1998 as she was required to obtain Visa and ticket. In fact, the trial Court should have verified as to on which date the summons was served on the present appellant. If the trial Court had considered the aforesaid aspect of the matter, it would have issued fresh summons as it was next to impossible for the appellant – original defendant to appear before the trial Court within one day. Under these circumstances, while deciding the application for setting aside the ex parte decree, it cannot be said that no reasonable ground was given by the defendant for setting aside the ex parte decree. The Court should have considered the aspect that when the summons is to be served on the other side at Canada, at least, long time should have been given so that the appellant – original defendant is in a position to appear and take part in the suit proceedings. It is required to be noted that it is not a case where the appellant was not interested in defending the proceedings. Otherwise, she would not have filed the reply, which was prepared in Canada. Under the circumstances, the appellant cannot be said to be negligent and appropriate grounds were given for setting aside the ex parte order. The learned trial Judge

has not properly considered this aspect of the matter and, therefore, the application filed by the appellant under Order 9 Rule 13 of the Civil Procedure Code is granted. The impugned order is set aside, the effect of the same is that Hindu Marriage Petition No.22 of 1998 is restored to the file of the trial Court. The trial Court shall decide the said petition in accordance with law.

The appeal is allowed with no order as to costs.

(P.B. Majmudar, J.)

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